Supreme Court, U. S.
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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-905

UNITED STATES OF AMERICA,

Respondent/Plaintiff,

vs.

HORACE J. McKENNA,

Petitioner/Defendant

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. .....

UNITED STATES OF AMERICA,

Respondent/Plaintiff,

vs.

HORACE J. McKENNA,

Petitioner/Defendant.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the United States Supreme Court, October Term, 1978:

This is a petition of Horace J. McKenna for a Writ of Certiorari to review the orders made by the United States Court of Appeals for the Ninth Circuit on January 13, 1978, denying petitioner's appeal, and on November 6, 1978, denying petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc, which appeal was sought to review the order made by the United States District Court, Central

District of California, on September 7, 1976, convicting petitioner of violations of Title 18 U.S.C. §§ 371, 472 and 473[1].

OPINIONS BELOW

To petitioner's knowledge there are no official or unofficial reports of (a) the order of the United States Court of Appeals for the Ninth Circuit entered on January 13, 1978 affirming petitioner's conviction on all counts (a copy of said order has been attached hereto as Appendix "A" [appendix pp. 1 - 5]), or (b) the order filed by the Court of Appeals for the Ninth Circuit on November 6, 1978 denying petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc (a copy of said order has been attached hereto as Appendix "B" [appendix pp. 5 - 7]).

JURISDICTION

1. On June 9, 1976 a three-count indictment was returned against petitioner alleging violations of Title 18 U.S.C. §§ 371, 472 and 473.

2. Petitioner was convicted on all counts of the indictment and sentenced to a total of six years incarceration on September 7, 1976. Petitioner filed a timely Notice of Appeal on said date.

3. On January 13, 1978 petitioner's conviction on all counts of the indictment was confirmed by the Court of

[1] 18 U.S.C. § 371 - conspiracy; 18 U.S.C. § 472 - possession of counterfeit federal reserve notes with intent to defraud; and 18 U.S.C. § 473 - delivery of counterfeit notes with intent that they be passed into circulation.

Appeals for the Ninth Circuit.

4. On November 6, 1978 petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc was denied.

5. On November 13, 1978, an Application for Stay of Mandate was filed with the Court of Appeals for the Ninth Circuit and, as of this date, has not been ruled upon.

6. There have been no motions for extension of time within which to file this Petition for Writ of Certiorari.

7. The jurisdiction of this Court is invoked under Title 28, U.S.C. § 1254(1).

QUESTIONS PRESENTED

I. May a witness be called to testify at a criminal trial in the federal court, for the sole purpose of introducing before the jury a prior tape recorded conversation, not under oath of that witness, when:

A. The prosecution knows, or has reason to know, that the witness will repudiate the prior conversation by admitting that the remarks in the conversation were made but were untrue; and

B. The witness claims that the conversation occurred when the witness was under the influence of drugs?

II. Does the refusal of the trial judge to instruct the jury on the limited purpose that a tape recorded conversation was admitted require reversal of a conviction when:

A. The tape recorded conversation was not under oath;

B. The tape recorded conversation was repudia-

ted by the witness when testifying;

C. The tape recorded conversation is the *only* evidence tending to corroborate the testimony of an accomplice, the principal government witness; the accomplice's testimony implicating petitioner was refuted by the testimony of another admitted accomplice, a defense witness;

D. The prosecutor argued in closing argument that the tape recorded conversation corroborated the government's witness (an accomplice) and constituted the true version of the offense in question; and

E. The defense requested a "limiting" instruction?

III. Does the mandatory language of Rule 30 of the Federal Rules of Criminal Procedure require the reversal of a conviction when the trial judge refused to instruct the jury on the law relating to how the jury should weigh the credibility of an accomplice and informer at the conclusion of closing argument by counsel and when:

A. The trial judge gave "general credibility instructions" to the jury prior to receiving any testimony;

B. The trial judge gave all remaining "instructions" at the close of final argument by counsel and "reminded" the jury that instructions regarding the credibility of witnesses had been given to them before testimony was received; and

C. The jury was required to judge the credibility of the government witness's testimony, an accomplice, as compared to the testimony of defense witnesses directly contradicting the government witness?

IV. Are the courts of the United States required to give instructions informing the jury that the testimony of an accomplice and informer should be weighed with greater care than the testimony of an ordinary witness when the prosecution relies upon the credibility of an admitted accomplice and informer, testifying under immunity, whose testimony is directly contradicted by defense witnesses?

V. May an accused citizen, in the federal courts, be convicted solely on the testimony of an uncorroborated admitted accomplice and informer testifying under grant of immunity when the accomplice's testimony is contradicted by the testimony of defense witnesses?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are set forth in Appendix "C" [appendix pp. 7 - 9]; they are:

1. Fifth Amendment to the United States Constitution;
2. Sixth Amendment to the United States Constitution;
3. Rule 30, Federal Rules of Criminal Procedure; and
4. Rule 52, Federal Rules of Criminal Procedure.

STATEMENT OF FACTS

At trial, the only witness accusing petitioner McKenna of criminal conduct was Anthony Perkins, an uncorroborated accomplice, testifying under grant of immunity, who agreed to testify for the government after charges against him had been dismissed. Perkins testified that he obtained the counterfeit money, seized when he (Perkins) was arrested. Perkins testified that he, along with Dennis Jocque, received the counterfeit currency at petitioner McKenna's apartment where Perkins and Jocque spent three days sorting and "doctoring" the counterfeit currency. Dennis Jocque, who was arrested with Perkins, testified that petitioner McKenna was *not* the source of the counterfeit currency and that the currency was *not* sorted in petitioner McKenna's apartment. Dennis Jocque's testimony was corroborated by Carolyn Hagan, a girlfriend of petitioner McKenna, who testified that she was present at McKenna's apartment at the time that Perkins testified that he sorted the counterfeit currency at the apartment and that during that period Perkins was not at the apartment. Another defense witness, Robert Ball, a fingerprint specialist for the United States Secret Service, testified that he did not recover any latent fingerprints of petitioner from the counterfeit money seized when Perkins was arrested.

After the arrest of Anthony Perkins, Joyce Turner was interviewed by deputies of the Los Angeles County Sheriff's Department. This interview was tape recorded without her knowledge and appeared to corroborate, in part, Perkins' testimony concerning the preparation of the counterfeit money for distribution. Prior to the commencement of trial,

the government learned that Joyce Turner had repudiated her statements in the tape recording, claiming that all the statements on the tape were false and that the statements had been made when she was under the influence of drugs. At trial, Joyce Turner was called to testify and was granted immunity. Joyce Turner admitted making the statements contained in the tape recording, but she stated that they were untrue. The government, under the guise of impeachment, then played the tape recording to the jury. The defense objected to the procedure of calling Joyce Turner solely to impeach her and also requested a "limiting instruction" on how the jury could consider the tape recording. This limiting instruction was refused, and the prosecutor argued, in closing argument, that the tape recording corroborated the testimony of Anthony Perkins.

Prior to the commencement of testimony, the trial court instructed the jury on certain *general* principles of law by including how the jury should weigh the testimony of witnesses. The general instructions were not standard "Devitt and Blackmar" instructions but, rather, a generalized version of these instructions. At the conclusion of closing argument, and over defense objection, the trial court *refused* to instruct the jury on how it should weigh the testimony of an accomplice and informer as set forth in "Devitt and Blackmar" and merely referred the jury to the general instruction on how to weigh testimony given prior to the receipt of testimony.

REASONS FOR GRANTING THE WRIT

The prosecution's case against Mr. McKenna relied

solely upon the testimony of Anthony Perkins. This testimony was contradicted by defense witnesses Dennis Jocque, Carolyn Hagan and Robert Ball. The tape recorded conversation with Joyce Turner was the *only* additional evidence tending to corroborate Perkins. This testimony was received by calling Joyce Turner as a witness *solely* for the purpose of introducing the impeachment tape recording. The decision of the United States Court of Appeals for the Ninth Circuit allowing this practice, by implication, is in conflict with the rule prohibiting a witness being called solely for impeachment in the Third Circuit, Fifth Circuit, Sixth Circuit, Eighth Circuit, and Tenth Circuit Courts of Appeals. The ruling by the Ninth Circuit on this issue so departed from established procedure that this question should now be decided by this Honorable Court.

The decision of the Ninth Circuit in holding that it was harmless error to refuse to give a limiting instruction on the purpose for which the "impeachment" tape could be received, in a case depending upon the credibility of defense or prosecution witnesses, appears to be in conflict with decisions of the United States Courts of Appeals for the District of Columbia, the Third Circuit, Sixth Circuit, and Tenth Circuit.

Petitioner requests that this Court seize upon this opportunity to authoritatively interpret the language in Rule 30 of the Federal Rules of Criminal Procedure requiring jury instructions to be given at the conclusion of closing argument. This Court should also exercise its supervisory powers, and hear this case, to prevent trial judges from departing from this established procedure.

Petitioner contends that the actions of the trial judge in only giving "general credibility instructions"

on informers and accomplices was directly contradictory to the requirements stated by this Court in *On Lee*, 343 U.S. 757, 72 S. Ct. 967 (1952), where this Court held that an accused is entitled to have the issues submitted to the jury with careful instructions when the government uses informers, accessories, accomplices or false friends to make its case. This Court should also provide guidance under its supervisory powers to the circuit courts on what instructions are necessary in this situation.

Petitioner requests this Court to authoritatively construe its decision in *Caminetti v. United States*, 242 U.S. 470, 37 S. Ct. 192 (1917), and *Holmgren v. United States*, 212 U.S. 509, 30 S. Ct. 588 (1910), and repudiate the rule, adopted by the circuit courts, that these decisions allow the federal courts to sustain a conviction based *solely* upon the uncorroborated testimony of an accomplice.

ARGUMENT

I

It Is Reversible Error In The Federal Courts For The Prosecution To Be Allowed To Call A Witness To Testify Solely For The Purpose Of Impeaching The Witness's Trial Testimony With A Tape Recorded Conversation, Not Subject To Cross-Examination And Not Under Oath.

At trial, over defense objection, the prosecutor called Ms. Turner to testify, even though he knew that Ms. Turner had repudiated the statements contained in her tape recorded conversation. After being granted immunity, Ms. Turner

admitted making the statements in the tape recording but denied that they were true. The government, under the guise of impeachment, then played the tape to the jury.[2] The government, in closing argument, argued that the statements in the tape recorded conversation constituted two events of the case and that the tape recorded conversation corroborated its witness, Anthony Perkins, an accomplice. While not ruling on this contention of petitioner, the Ninth Circuit, by implication, overruled *Bushaw v. United States,* 353 F.2d 477, 481 (9th Cir. 1975), *cert. denied,* 384 U.S. 921, and allowed this practice in direct contradiction to the rule in other circuits. *United States v. Miles,* 413 F.2d 34, 37 (3rd Cir. 1969); *Hooks v. United States,* 375 F.2d 212, 214 (5th Cir. 1967); *United States v. Shoupe,* 548 F.2d 636, 643 (6th Cir. 1977); *United States v. Rogers,* 549 F.2d 490, 497 (8th Cir. 1976); and *United States v. Coppola,* 475 F.2d 1153, 1158 (10th Cir. 1973).

Petitioner is unaware of any opinion of this Court allowing the prosecution, in a federal trial, to call a witness to testify solely for the purpose of introducing a prior hearsay statement, not under oath and not subject to cross-examination, in a criminal trial. Petitioner requests that this Court take this opportunity to set forth a rule prohibiting this conduct on behalf of the government in the federal district courts. It is submitted that the Fifth Amendment right to a fair trial and the Sixth Amendment rights to confront and cross-examine witnesses, along with this Court's inherent power to supervise the federal courts, requires this

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[2]It must be remembered that the defendant's request for a limiting instruction as to the purpose of the tape was refused by the trial judge.

conduct on behalf of the government to be prohibited and that petitioner's conviction be reversed.

II

Mr. McKenna Was Denied A Fair Trial And His Right To A Jury Trial When The Trial Judge Refused To Give A Limiting Instruction Instructing The Jury On How It Could Use The "Impeachment Tape" In Determining Petitioner's Guilt Or Innocence; This Error Was Not Cured By Comments Of Counsel To The Jury During Closing Argument.

At petitioner's trial, the prosecution played a tape recorded conversation of Joyce Turner, after she admitted the conversation, to "impeach" her testimony. Prior to argument, the defense requested a "limiting" instruction, but this instruction was not given. The Court of Appeals for the Ninth Circuit held that it was error not to give the limiting instruction but then held that this error was cured by statements of the prosecutor and defense counsel to the jury during closing argument regarding the purpose of the limiting instruction.

The decision of the Ninth Circuit, concluding that the error in not giving the limiting instruction was "harmless," was in direct contradiction to the result reached by other circuits in cases depending upon the credibility of witnesses for a conviction. *United States v. Gilliam,* 484 F.2d 1093, 1095-98 (C.A. D.C. 1973); *United States v. Small,* 443 F.2d 497, 500 (3rd Cir. 1971); *United States v. Kemp,* 504 F.2d 421, 423, 424 (6th Cir. 1974); and *United States v. Coppola,*

475 F.2d 1153, 1158 (10th Cir. 1973). The decision of the Ninth Circuit also overruled, by implication, *United States v. Washabaugh*, 442 F.2d 1127, 1130, 1131 (9th Cir. 1971). This Honorable Court should take this opportunity to clarify the law in this regard within the various circuits and to affirmatively hold that the failure to give the limiting instruction on the impeachment tape, affecting petitioner's right to a jury trial, was not harmless error. *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824 (1967).[3]

This Court should also grant certiorari in the instant case to review the decision of the Ninth Circuit wherein it concluded that statements of counsel in closing argument were adequate to instruct the jury on the "impeachment" purpose of the tape recording. This language by the Ninth Circuit is in direct violation of the requirements of Rule 30 of the Federal Rules of Criminal Procedure requiring the *court* to instruct the jury on the law and, also, in violation of case authority. *Medley v. United States*, 155 F.2d 857, 860 (C.A. D.C. 1946); *Copeland v. United States*, 152 F.2d 769, 770 (C.A. D.C. 1945). The opinion by the Ninth Circuit so departed from established procedure that a hearing should be granted by this Court.[4]

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[3]This Court should also determine whether the failure to give a limiting instruction affecting the citizen's right to a jury trial should be governed by the "constitutional" harmless error provisions of *Chapman v. California, supra*, or the provisions of *Kotteakos v. United States*, 328 U.S. 705, 764, 66 S. Ct. 1239 (1946).

[4]In fact, the prosecutor, in arguing to the jury, argued that the tape recording of Ms. Turner was the truth in the case, was consistent with Perkins' testimony, and could be believed by the jury in its consideration of the case.

III

The Mandatory Language In Rule 30 Of The Federal Rules Of Criminal Procedure Requires A Trial Judge To Instruct The Jury On The Applicable Law After Argument Of Counsel.

It is undisputed that Rule 30 of Federal Rules of Criminal Procedure requires the trial judge to instruct the jury on the law applicable to the case at the conclusion of counsel's closing argument. In the instant case, the trial court had previously instructed the jury, prior to the receipt of testimony, on general principles regarding how the jury should determine the credibility of witnesses. When the jury was instructed after closing argument, over defense objection, the trial court merely referred the jury to the previous instructions given to it prior to the receipt of testimony. The Court of Appeals for the Ninth Circuit concluded that this was harmless error.

It is the contention of petitioner that the guilt or innocence of petitioner depended upon how the jury viewed the credibility of Anthony Perkins. At the conclusion of evidence and argument, the jury was instructed on all areas of the law *except credibility, the area most critical to the defense*. It is the contention of the defense that the refusal to give credibility instructions at this time denied petitioner his right to a jury trial. See *United States v. Pinkney*, 551 F.2d 1241, 1245 (C.A. D.C. 1976); and *United States v. Alsten*, 551 F.2d 315, 319 - 321 (C.A. D.C. 1976). There is obviously a conflict in the circuits on this point, and for that reason, this Court should grant a hearing in this matter.

The decision of the Ninth Circuit in holding that this error under the facts of this case was "harmless" also appears to be in conflict with this Honorable Court's opinion in *Kotteakos v. Superior Court, supra,* 328 U.S. at 764, 765, where this Court intimates that there is a different "harmless error" standard where conduct is a departure from a constitutional norm or a specific command of Congress.

IV

Petitioner Was Denied A Fair Trial And His Right To A Jury Trial When The Trial Court Refused To Give "Complete" Instructions On How The Jury Should Determine The Credibility Of An "Informer" And "Accomplice."

Prior to the receipt of testimony, the trial court gave "general" instructions.[5] The defense requested Devitt and Blackmar, FEDERAL JURY PRACTICE AND INSTRUCTIONS (2d Ed.) numbers 12.02 and 12.04. These instructions were refused. The general instructions given prior to the receipt of testimony did *not* instruct the jury that it should view the testimony of an interested witness or informer with greater care than it should view the testimony of an ordinary witness, and the instructions given did not instruct the jury that Mr. McKenna could be convicted on the unsupported testimony of an accomplice only if the jury believed the accomplice's testimony beyond a reasonable doubt. The Ninth Circuit concluded that the instructions

[5]The court instructed as follows: "You should consider the status of a witness. If the witness is an informer for the government or an accomplice or participant in the commission of the crime charged, you should view such testimony conscientiously and weigh its probative value with great care."

given by the trial judge were satisfactory.

This conclusion by the Ninth Circuit is in direct conflict with this Honorable Court's opinion in *On Lee,* 343 U.S. 757, 72 S. Ct. 967, 973 (1952), where this Court held that a defendant is entitled, in a case involving informers, accessories, accomplices or false friends, to have the issue submitted to the jury with *careful* instructions. See also *United States v. Kinnard,* 465 F.2d 566 (C.A. D.C. 1972). This Honorable Court should grant petitioner a hearing to settle this issue within the circuits and to eliminate the Ninth Circuit's apparent conflict with this Honorable Court on this issue.

V

In The Federal Courts A Conviction May Not Be Based Upon Uncorroborated Testimony Of An Admitted Accomplice And Informer Testifying Under Grant Of Immunity When The Accomplice's Testimony Is Contradicted By Defense Witnesses.

Petitioner's conviction in the trial court rested *solely* upon the testimony of Anthony Perkins, an admitted accomplice and informer testifying under a grant of immunity. Numerous state courts, including California, do *not* allow a conviction to rest on this evidence.[6] The federal courts have interpreted past decisions of this Honorable Court as allowing a conviction on the uncorroborated testimony of an accomplice. See *United States v. Alsten,* 551 F.2d 315, 319 - 320 (C.A. D.C. 1976).

[6]See California Penal Code § 1111; *People v. Robinson,* 61 Cal. 2d 373, 38 Cal. Rptr. 890 (1964).

Petitioner contends that this rule was arrived at in the federal courts because of an improper reading of *Holmgren v. United States*, 212 U.S. 509, 523, 30 S. Ct. 588 (1910), and *Caminetti v. United States*, 242 U.S. 470, 495, 37 S. Ct. 192 (1917). See *United States v. Hibler*, 463 F.2d 455 (9th Cir. 1972), Judge Anderson concurring, 463 F.2d at 462.

It is respectfully submitted that this Honorable Court should take this opportunity to announce the ruling in the federal courts, under this Court's supervisory powers, that the conviction of an accused citizen may not be sustained on the uncorroborated testimony of an accomplice.

CONCLUSION

Petitioner was convicted by a jury whose task it was to decide whether to believe the accomplice, Anthony Perkins, or defense witnesses. A prosecution witness was called solely for the purpose of allowing impeachment material to be placed before the jury. A requested limiting instruction, as to the impeachment material, was refused by the trial judge. The jury was not instructed on how it should determine the credibility of witnesses at the conclusion of argument, as required by Rule 30 of the Federal Rules of Criminal Procedure, and as requested by counsel. Incomplete instructions on "accomplices" and "informers" were given prior to the receipt of testimony. The trial court, and the United States Court of Appeals for the Ninth Circuit in upholding petitioner's conviction, as set forth in this Petition for Writ of Certiorari, made rulings (1) conflicting with those of other circuits; (2) in direct conflict with opinions by this

Honorable Court; and (3) in departure from established precedent. These rulings bring this case clearly within Rule 19, Supreme Court Rules, Title 28 U.S.C., and for that reason, it is respectfully requested that this Honorable Court grant a hearing on petitioner's matter and resolve these serious problems affecting the federal judiciary.

Respectfully submitted,

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APPENDIX "A"

ORDER OF AFFIRMANCE

In the United States Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. HORACE J. McKENNA, Defendant-Appellant.

No. 76-3029

[Memorandum Filed January 13, 1978]

Appeal from the United States District Court for the Central District of California

Before: CHAMBERS, GOODWIN and KENNEDY, Circuit Judges.

Horace McKenna appeals his convictions by a jury of conspiracy, a violation of 18 U.S.C. § 371; possession of counterfeit federal reserve notes with intent to defraud, a violation of 18 U.S.C. § 471; and delivery of counterfeit notes with intent that they be passed into circulation, a violation of 18 U.S.C. § 472. We affirm.

The primary prosecution witness was Anthony Perkins, a cousin of appellant, who had been granted immunity in exchange for his testimony. In substance, Perkins testified that: McKenna had contacted him and offered him $10,000 in counterfeit bills if he would assist in McKenna's scheme to pass approximately $50,000 in worthless notes; it was McKenna's plan to have three individuals, one of them Perkins, pass the money at various amusement parks in the Los Angeles area; Perkins eventually agreed and spent three days in McKenna's apartment preparing the bills for

distribution. On November 26, 1975, Perkins and several associates were arrested in Disneyland after cashing several counterfeit notes. Following his arrest, Perkins became a government informer. At their request, he made several telephone calls to McKenna which were taped. In June of 1976, McKenna was indicted for his connection with the counterfeit federal reserve notes.

To bolster the testimony of Perkins, the government called Joyce Turner, the wife of a friend of McKenna. The district court granted her immunity after she refused to testify. On direct examination she denied having seen or heard of any counterfeit money in McKenna's apartment. To impeach her testimony, the government played a tape of her statements to a police officer implicating McKenna in the counterfeiting operation.

On appeal, appellant argues eight grounds for reversal. First, he challenges the instruction on the credibility of accomplice and informant testimony. Prior to the government's presentation of its case, the district court gave preliminary instructions to the jury, including one cautioning them about testimony from a government informer or a participant in the crime charged. Despite appellant's request, the district court did not include that instruction among those it gave the jury after closing arguments. Appellant contends that the district court violated Rule 30, Federal Rules of Criminal Procedure, by failing to repeat the instruction after the evidence had been presented. We agree that the letter of Rule 30 was violated. However, this court has held that failure to comply with Rule 30 is reversible error only if appellant is thereby prejudiced. See *United States v. Hermosillo-Nanez*, 545 F.2d 1230, 1233

(9th Cir. 1976), *cert. denied*, 429 U.S. 1050 (1977). We are unable to conclude that appellant has been prejudiced. The trial was relatively simple. The instruction was given at a time calculated to assist the jury in evaluating the testimony of Perkins. In addition, defense counsel in his closing argument adequately refreshed the jury's recollection of the instruction. There was no evidence of jury confusion; they made no request for additional instructions. Appellant argues, however, that the preliminary instruction was prejudicially deficient even if failure to repeat it was not reversible error. We disagree. Although concise, the instruction correctly stated the law.

The second error raised by appellant is the failure of the district court to give a requested limiting instruction prohibiting the jury from considering the taped statements of Mrs. Turner as evidence of the content of those statements. Rule 105, Federal Rules of Evidence, provides that when evidence is admissible for only a limited purpose—such as this impeachment evidence—"the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." We think it would have been better for the district court to have given a limiting instruction as requested. However, the failure to do so is not reversible error in this case. The government, when introducing the evidence, made it clear that the purpose of the evidence was to impeach Mrs. Turner's testimony. In addition, both sides told the jury during closing argument that the tape was introduced for this limited purpose. Finally, there was no evidence that the jury was confused. *Compare United States v. Washabaugh*, 442 F.2d 1127, 1131 (9th Cir.

1971). We therefore conclude that failure to give the requested instruction was harmless error under Rule 52(a), Federal Rules of Criminal Procedure. See *Thompson v. United States*, 389 F.2d 37, 38 (9th Cir.), *cert. denied*, 391 U.S. 903 (1968).

The third alleged error was the failure to give an instruction that a conviction cannot stand on the uncorroborated testimony of an accomplice. That is not the law of this circuit. See *United States v. Turner*, 528 F.2d 143, 161 (9th Cir. 1975), *cert. denied sub nom, Hackett v. United States*, 429 U.S. 837 (1976). It was properly refused.

As the fourth ground for reversal, appellant argues that the admission into evidence of portions of the taped phone conversations between appellant and Perkins violated his fifth amendment right to remain silent and his sixth amendment right to counsel. This argument has no merit. Parenthetically it should be noted that the conversations occurred before appellant had been indicted and before the focus on him had shifted from investigation to accusation in nature. See *Brewer v. Williams*, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977); *United States v. Massiah*, 377 U.S. 201 (1964).

The fifth ground concerned Perkins' lie to appellant during a taped phone conversation that appellant's attorney had told Perkins' lawyer that appellant was the source of the counterfeit notes. Appellant asserts that his sixth amendment right to counsel was thereby violated. The intrusion occurred too early in the investigation to be a violation of the sixth amendment. See *Brewer v. Williams, supra.*

The sixth ground for reversal pertains to the prosecutor's statement in closing argument that the defense witnesses were "pathetic." Appellant argues that this comment was prejudicial. That does not prove that it was inappropriate.

Appellant's seventh ground for reversal is the district court's refusal to permit the defense to introduce a prior consistent statement of a witness into evidence. The district court properly exercised its discretion in keeping the evidence out.

Finally, appellant challenges the refusal of the district court to grant a continuance. The granting of a continuance rests in the sound discretion of the district court. See *United States v. Michelson*, ... F.2d ..... (9th Cir. 1977) (slip opinion pp. 1986, 1991). There was no clear abuse of that discretion here.

AFFIRMED.

†

APPENDIX "B"

ORDER DENYING PETITION FOR REHEARING, ETC.

In the United States Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA, Appellee, v. HORACE J. McKENNA, Appellant.

No. 76-3029.

[Filed November 6, 1978]

Appeal from the United States District Court for the Central District of California

Before: CHAMBERS, GOODWIN, and KENNEDY, Circuit Judges.

On petition for rehearing the defendant again contends that the error of the district court in refusing a timely request for a limiting instruction was error *per se* which requires reversal and a new trial, no matter how copious the evidence of guilt.

The district court erred, and it should not fail to give limiting instructions when appropriate in the future. The receipt in evidence of a tape-recorded statement to impeach a witness virtually always must be accompanied by a cautionary instruction to the jury that the tape is received for impeachment only and that the jury is not to consider the statement as proof of the substantive facts in issue. We also recognize that in many cases the omission of the cautionary instruction would require reversal. But in this case we have again reviewed the evidence and it is plain that to recycle this case would be a triumph of form over substance. It is difficult to imagine how a jury could have reached a different verdict, no matter how the trial judge instructed.

The petition for rehearing included a suggestion for rehearing en banc. At the request of the panel, a response to the petition with suggestion was filed. The panel has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested

a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

†

APPENDIX "C"

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution:

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an

impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Statutory Provisions

Federal Rules of Criminal Procedure

Rule 30, Title 18

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file a written request that the court instruct the jury on the law as set forth in the request. At the same time copies of such request shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the request prior to their argument to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury, and on request of any party, out of the presence of the jury.

Federal Rules of Criminal Procedure (cont'd)

Rule 52, Title 18

(A) Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(B) Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

†

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, over the age of eighteen years and not a party to the within action or proceeding; that

My buisness address is 326½ Main Street, Huntington Beach, California 92648, that on DECEMBER 4th 1978, I served the within PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (United States of America vs. Horace J. McKenna) on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

United States District Court
For the Central District of California
United States Courthouse
312 North Spring Street
Los Angeles, California 90012
(1 Copy)

United States Attorney
For the Central District of California
United States Courthouse
312 North Spring Street
Los Angeles, California 90012
(2 Copies)

United States Court of Appeals
For the Ninth Circuit
Court of Appeals & Courthouse Bldg.
Seventh & Mission Streets
San Francisco, California 94101
(1 Copy)

Solicitor General of the United States
U. S. Department of Justice
Washington, D. C. 20530
(3 Copies)

I declare under penalty of perjury that the foregoing is true and correct.

Executed on DECEMBER 4th 1978, at HUNTINGTON ~~BEACH, CALIFORNIA~~.

D. A. Standefer

41 Copies to U. S. Supreme Court, U. S. Supreme Court Building, Washington, D. C. Zip Code 20543

Dean-Standefer, 326½ Main St., Huntington Beach, Ca. 92648
(714) 536-7161

SUPREME COURT, U.S.
FILED
MAR 2 1979
JR., CLERK

No. 78-905

In the Supreme Court of the United States

OCTOBER TERM, 1978

HORACE J. MCKENNA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

CAROLYN GAINES
Attorney
Department of Justice
Washington, D.C. 20530

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals affirmed by judgment order (Pet. App. 1-5).

JURISDICTION

The judgment of the court of appeals was entered on January 13, 1978. A petition for rehearing was denied on November 6, 1978 (Pet. App. 5-7). The petition for a writ of certiorari was filed on December 6, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether in the context of this case the court correctly allowed the government to impeach its own witness through the use of a tape-recorded conversation that the witness had previously had with police officials.

2. Whether the failure to give an instruction limiting the use of this tape-recorded conversation to impeachment was reversible error where the jury had been advised of the limited purpose for which the recording had been admitted.

3. Whether the district court's instruction on the credibility of accomplice testimony denied petitioner a fair trial.

4. Whether a defendant may be convicted solely upon the uncorroborated testimony of an accomplice.

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted of conspiracy to possess counterfeit Federal Reserve Notes with intent to defraud, in violation of 18 U.S.C. 371 (Count 1), of possession of counterfeit Federal Reserve Notes with intent to defraud, in violation of 18 U.S.C. 472 (Count 2), and of transfer and delivery of counterfeit Federal Reserve Notes, in violation of 18 U.S.C. 473 (Count 3). He was sentenced to concurrent terms of five years' imprisonment on Count 1 and to six years' imprisonment on Counts 2 and 3. The court of appeals affirmed (Pet. App. 1-5).

The evidence at trial is summarized in the decision of the court of appeals (Pet. App. 1-2). It showed that petitioner contacted his cousin, Anthony Perkins, and offered him $10,000 in counterfeit Federal Reserve Notes if he would assist petitioner in passing approximately $50,000 of the counterfeit currency. Petitioner planned to have Perkins and two other individuals pass the money at various amusement parks in the Los Angeles area. Perkins accepted petitioner's proposal and spent three days in petitioner's apartment preparing the counterfeit bills for distribution. On November 26, 1975, Perkins and several associates were arrested in Disneyland after cashing the counterfeit notes.

Thereafter, Perkins agreed to become a government informant and testified as a government witness at trial. His testimony implicated petitioner in the illegal scheme (Tr. 257-268).

ARGUMENT

1. Petitioner claims (Pet. 8-11) that the district court erred by allowing the government to call a witness to testify solely for the purpose of implicating the witness with unsworn statements she had made in a prior tape-recorded conversation with police investigators.

a. Prior to trial, Joyce Turner was interviewed by two officers from the Los Angeles County Sheriff's Department (Tr. 158). During this interview, she informed the officers that she had seen petitioner in his apartment with stacks of $20 bills. This inter-

view was recorded. Turner thereafter informed the government that she would plead the Fifth Amendment rather than testify and that, if called as a witness, she would repudiate the statements she had previously given to the officers (Tr. 134-140).

At the beginning of the trial, the government obtained a grant of immunity for Turner and called her as a witness to corroborate Perkins' testimony (Tr. 134-136). When Turner took the stand, the district court cautioned her that she was now testifying under oath and "that if you give untruthful testimony that you are subject to the penalties of perjury" (Tr. 143). She replied, "Okay. I am under oath now, and I respect that * * *" (*Ibid.*). The prosecutor then asked her if she had ever seen anyone in petitioner's apartment with $20 bills. She responded, "No, I did not" (Tr. 145). To refresh the witness's recollection and to impeach this testimony, the government introduced into evidence the tape of her interview with the local police officials (Tr. 145-164).

b. There may be circumstances where the "real purpose" of calling a hostile witness is to employ an otherwise inadmissible prior inconsistent statement to impeach the witness and where doing so would deny the defendant a fair trial. *United States* v. *Morlang*, 531 F.2d 183, 188 (4th Cir. 1975);[1] see also *United States* v. *Shoupe*, 548 F.2d 636, 643 (6th Cir. 1977). But this is not such a case. Here, the

[1] In *United States* v. *Morlang*, *supra*, the government acknowledged that it knew that the witness would repudiate the prior statement at trial. 531 F.2d at 188 & n.11.

prosecutor was justified in hoping that, under oath, Turner would support rather than recant her prior statement. Once Turner was granted an immunity from prosecutive use of her testimony, it was reasonable to assume that she would testify truthfully at trial.[2] As the Second Circuit stated in *United States* v. *Burket*, 480 F.2d 568, 572 (1973), even where a witness has threatened to disavow a prior unsworn statement, the government may call the witness to "see what they would actually do under the sanctity of the oath." If their testimony under oath conflicts with the prior statement, it is then proper to employ the earlier statement to refresh the witness's recollection and, if necessary, to impeach the testimony. *Ibid.* See Fed. R. Evid. 607; *United States* v. *Rogers*, 549 F.2d 490 (8th Cir. 1976), cert. denied, 431 U.S. 918 (1977); *United States* v. *Mendell*, 538 F.2d 1238 (6th Cir. 1976).[3] Any other rule would

[2] The possibility of prosecution had motivated, in part, her reluctance to testify at trial. See page 3, *supra*. If there were concern with the reasonableness of the government's hope that the witness would testify consistently with her prior statement after immunity was granted, this could have been explored in a *voir dire* proceeding. But defense counsel did not request such a proceeding at trial.

[3] Petitioner's reliance (Pet. 10) on *Bushaw* v. *United States*, 353 F.2d 477, 481 (9th Cir. 1965), cert. denied, 384 U.S. 921 (1966), *United States* v. *Miles*, 413 F.2d 34, 37 (3d Cir. 1969), *Hooks* v. *United States*, 375 F.2d 212, 214 (5th Cir. 1967), and *United States* v. *Coppola*, 479 F.2d 1153, 1158 (10th Cir. 1973), is misplaced. These cases, decided prior to the adoption of Rule 607 of the Federal Rules of Evidence, hold that a party may not impeach its own witness unless it is "surprised" by adverse testimony. Rule 607 has rejected

place "the prosecution in the untenable position of either abiding by her trial testimony or not calling her as a witness." *United States* v. *Jordano*, 521 F.2d 695, 697 (2d Cir. 1975).

2. Petitioner contends (Pet. 11-12) that he was denied a fair trial because the district court failed to instruct the jury at the close of the evidence that the taped conversation of witness Joyce Turner was to be considered for impeachment only. The court of appeals correctly held, however, that the absence of such an instruction at the close of the evidence was harmless error because (Pet. App. 3) "[t]he government, when introducing the evidence, made it clear that the purpose of the evidence was to impeach Mrs. Turner's testimony." Furthermore, in its closing argument, the government again informed the jury of the limited purpose for which the tape had been introduced, stating (Tr. 359): "Now, we introduced that tape recording in order to impeach her testimony on the stand." Defense counsel also emphasized the limited admissibility of the tape during closing argument (Tr. 381):

> The testimony of Joyce Turner. First of all, ladies and gentlemen, as I remember it, and your memory controls, that tape recording was offered for impeachment and not for the truth of the matter.

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this approach. See, *e.g.*, *United States* v. *Rogers*, *supra*, 549 F.2d at 495 n.6; *United States* v. *Mendell*, *supra*, 538 F.2d at 1238-1239.

Under these circumstances, the court of appeals properly ruled that the jury had been sufficiently informed that the tape was admitted solely for impeachment purposes and not as substantive evidence.[4] See also *Thompson* v. *United States*, 389 F.2d 37, 38 (9th Cir.), cert. denied, 391 U.S. 903 (1968).

3. Petitioner argues (Pet. 13-15) that the district court's failure to instruct the jury at the close of the evidence on the credibility of informers and accomplices deprived him of a fair trial. The court of appeals correctly concluded, however, that, while the trial court erred in failing to give such instructtions at the close of the evidence, in the context of the entire trial, the error was harmless (Pet. App. 2).

Prior to the government's presentation of its case, the district court gave preliminary instructions to the jury, including an instruction cautioning them about testimony from a government informer or a participant in the crime. The district court instructed (Tr. 28):

> You should consider the status of a witness. If the witness is an informer for the government or an accomplice or participant in the com-

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[4] *United States* v. *Gilliam*, 484 F.2d 1093 (D.C. Cir. 1973), *United States* v. *Small*, 443 F.2d 497 (3d Cir. 1971), *United States* v. *Kemp*, 504 F.2d 421 (6th Cir. 1974), and *United States* v. *Coppola*, 479 F.2d 1153 (10th Cir. 1973), on which petitioner relies (Pet. 11-12), are therefore inapposite. In those cases, no cautionary instruction had been given and there was no indication that the jury had otherwise been informed of the limited purpose for which the evidence had been admitted.

> mission of a crime charged you should view such testimony cautiously and weigh its probative value with great care.

The court of appeals noted that this instruction correctly states the law and that it was "given at a time calculated to assist the jury in evaluating the testimony" (Pet. App. 3). The failure to repeat the instruction after the conclusion of the evidence did not prejudice petitioner[5] and thus did not constitute reversible error.[6] See *United States* v. *Hermosillo-Nanez*, 545 F.2d 1230, 1233 (9th Cir. 1976), cert. denied, 429 U.S. 1050 (1977).

4. Finally, there is no merit to petitioner's contention (Pet. 15-16) that the rule permitting the conviction of a defendant upon the uncorroborated testimony of an accomplice (see, *e.g.*, *United States* v. *Alston*, 551 F.2d 315, 319-320 (D.C. Cir. 1976)), is based on an improper reading of *Caminetti* v. *United States*, 242 U.S. 470 (1917), and *Holmgren* v. *United States*, 217 U.S. 509 (1910). It has long been settled at common law that a conviction may be had on the uncorroborated testimony of an accomplice

[5] The court of appeals noted that the defense counsel refreshed the jury's recollection of the court's instruction during his closing argument (Pet. App. 3).

[6] Petitioner's reliance (Pet. 13) on *United States* v. *Pinkney*, 551 F.2d 1241 (D.C. Cir. 1976), and *United States* v. *Alston*, 551 F.2d 315 (D.C. Cir. 1976), is misplaced. In those cases the court concluded that the defendant had been prejudiced when the trial court's failure to give a proper instruction at the close of the evidence was not cured by any other instruction.

where the evidence satisfies the jury beyond a reasonable doubt of the guilt of the accused. *Mark Yick Hee* v. *United States*, 223 F. 732, 735 (2d Cir. 1915). There is no need for this Court to review the settled rule.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1979

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